Supreme Court of the United States

OCTOBER TERM, 1966

No. 649

JACKIE WASHINGTON, PETITIONER

vs.

TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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[fol. 1]

CRIMINAL DISTRICT COURT NO. 4
DALLAS COUNTY, TEXAS

January Term, 1965

THE STATE OF TEXAS

vs.

JACKIE WASHINGTON

* * * *

EXCERPT FROM STATEMENT OF FACTS

* * * *

[fol. 2]

* * * *

APPEARANCES:

FOR THE STATE:

HON. HENRY WADE, Criminal District Attorney of Dallas County, Texas, by:

HON. JIM ZIMMERMANN AND HON. MIKE EVERETT

FOR THE DEFENDANT:

HON. HOWARD LAW AND HON. TOM PURNELL, Texas Bank Building, Dallas, Texas.

BE IT REMEMBERED, that upon trial of the above entitled and numbered cause held on the 19th day of March, A. D., 1965, before HIS HONOR, JUDGE JOHN MEAD, and a jury, the following proceedings were had:

* * * *

[fol. 3]

COLLOQUY BETWEEN COURT AND COUNSEL

MR. ZIMMERMANN: Your Honor, ladies and gentlemen of the jury, that is the case for the State of Texas and we rest our case in chief.

THE COURT: The State rests in chief.

MR. LAW: May we proceed?

THE COURT: Proceed.

MR. LAW: Sheriff, we would like for you to produce Charles Fuller as a witness for the Defense. And, Your [fol. 4] Honor, we have another witness in the hall, too.

(A brief conference was had between Counsel and the Court out of the hearing of the jury.)

MR. LAW: Will you call Charles Ellis?

THE COURT: Put your objection in the record, Counsel.

MR. ZIMMERMANN: Now comes the State of Texas and objects to the calling of Charles Fuller by the Defense as a witness for the reason that Charles Fuller is currently under conviction for the crime of murder arising out of the same set of facts as Jackie Washington.

THE COURT: Go ahead.

* * * *

[fol. 5]

IN CRIMINAL DISTRICT COURT NUMBER FOUR
DALLAS COUNTY, TEXAS

January Term, 1965

No. E-7925-K

THE STATE OF TEXAS

vs.

JACKIE WASHINGTON

EXCERPT FROM AMENDED MOTION FOR NEW TRIAL—
Filed July 15, 1965

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Defendant in the above entitled and numbered cause with leave of Court first had and obtained,

said Court for good cause shown having extended the time for filing and amending the Motion for New Trial, with express leave of Court files this his Amended Motion for New Trial in lieu and in place of his prior Amended Motion for New Trial herein and moves the Court to set aside the verdict of the jury herein rendered against him and to grant him a new trial for the following reasons:

* * * *

[fol. 6] VI.

Because this Defendant was denied compulsory process for obtaining witnesses in his favor in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and the Texas Constitution by the refusal of the Court to permit the Defendant to call as a witness in this cause, Charles Fuller, a co-defendant previously convicted as aforesaid, said Fuller then and there being available in the Dallas County Jail and, who, if permitted to testify would have stated that Defendant attempted, both verbally and physically, to prevent him, Fuller, from using the weapon that caused the death of deceased and that, upon failing in his efforts, Defendant left the scene before the fatal shot was fired.

* * * *

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court set aside the verdict herein rendered against him and grant him a new trial herein.

/s/ Charles W. Tessmer
CHARLES W. TESSMER

/s/ Emmett Colvin, Jr.
EMMETT COLVIN, JR.
Attorneys for Defendant
706 Main Street, Suite 400
Dallas, Texas 75202

[fol. 7]

IN THE CRIMINAL DISTRICT COURT NO. 4
DALLAS COUNTY, TEXAS

[Title Omitted]

FORMAL BILL OF EXCEPTION NO. 1—Filed Aug. 17, 1965

BE IT REMEMBERED that upon the trial of the above styled and numbered cause, the Defendant offered the testimony of the Co-Defendant, Charles Fuller, who had been previously tried and convicted in this Court for the crime of murder with malice arising out of the same transaction as in this cause, the jury assessing his, Fuller's, punishment at fifty (50) years in the penitentiary, and the State objected to the calling of said Fuller to the stand to testify in behalf of Defendant for the reason that said Fuller was currently under conviction for the crime of murder arising out of the same set of facts as Defendant, and this Court sustained the objection of the State and refused to permit the Defendant to call the said Fuller, in violation of Defendant's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

BE IT FURTHER REMEMBERED that again upon the hearing on Defendant's Amended Motion For New Trial the Defendant offered the testimony of said Fuller, and upon objection by the State, was denied the right to call said Fuller to the stand and to offer his, Fuller's, testimony, in violation of Defendant's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States; that if, he, Fuller, had been permitted to testify, said Fuller, according to his Affidavit, admitted into evidence at said hearing would have stated:

"My name is Charles Fuller and I reside at Dallas County Jail. Telephone ————. I wish to to
[fol. 8] make the following statement of my own free will and accord, which to the best of my knowledge and belief is true and correct:

'I was indicted along with Jackie Washington for shooting a boy named Herman Vassel. I was tried and got 50 years before Jackie's trial. On the night Jackie Washington and the rest of the follows and I went to Jean Carter's house, 3 of the boys went in front of the house before Jack and I got near there, and, after throwing rocks at the house, they ran off. Jackie and I were walking fairly slow. He had the shotgun at first, but I took it from him and he continued to walk with me. When we got close to the house Jackie said "Let's go.", and tried to get me to leave. I wish to God I had left because all I really wanted to do was scare the people in Jean's house. After Jackie tried to get me to leave and pulledat me, he finally turned and ran.. I continued on to the front of Jean's house and shot at the front porch. I don't know what got into me because I never really intended to hit anyone—just scare. That's all any of us even talked about doing that night—just to scare Jean. Jackie shouldn't have been convicted because If I had listened to him that night when he wanted us both to leave, I wouldn't have shot anyone.'";

there being no witness to confirm or deny Defendant's statement and testimony at the trial of this cause that he had abandoned the project and tried to get Fuller to desist when he recognized that Fuller was intent upon killing rather than frightening someone, the testimony of said Co-Defendant. Fuller, was vital to the defense of [fol. 9] Defendant but, in apparent reliance upon Article 711, V.A.C.C.P., this Court refused to permit the testimony of said Co-Defendant to be offered in behalf of Defendant at the trial of this cause and at the hearing on Defendant' Amended Motion For New Trial, all in violation of Defendant's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

To all of which action of the Court the Defendant then and there excepted and here now tenders his Bill of Exception No. 1 and asks that the same be approved, allowed, signed by the Court and filed as a part of the record in this case.

/s/ CHARLES W. TESSMER
CHARLES W. TESSMER

/s/ EMMETT COLVIN, JR.
EMMETT COLVIN, JR.
Attorneys for Defendant
706 Main Street, Suite 400
Dallas, Texas 75202
RI8-3433 RI7-5893

The above and foregoing Bill of Exception is approved by the Court on this the day of ....., 1965, and ordered filed by the Clerk.

[File Endorsement Omitted in Printing]

[fol. 10]

IN THE CRIMINAL DISTRICT COURT NO. 4
DALLAS COUNTY, TEXAS

[Title Omitted]

JUDGE'S QUALIFICATIONS AND APPROVAL—Aug. 25, 1965

Defendant's Bill of Exception No. 1 is explained and qualified as follows.

In Defendant's Bill of Exception No. 1 page 1 and page 2 wherein the defendant states that said defendant, Jackie Washington, was denied a fair trial and that his rights were violated under the Sixth and Fourteenth Amendments to the Constitution of the United States, it is merely a contention of law by the defendant which the Court does now certify to be merely a contention of law by the defendant but the Court does not certify it herein as a fact. And the Court would further explain and qualify the said Bill by Reference to Article 711, V.A.C.C.P., where in Texas Law prohibits a Co-Defendant being called by the defense as a witness.

With the above qualifications and explanations Defendant's Bill of Exception No. 1 is approved and ordered filed as a part of the record in this case, this the 25th day of August, 1965.

/s/ JOHN MEAD
JOHN MEAD
Judge
Criminal District Court No. 4
Dallas County, Texas

The foregoing Bill of Exception is accepted by the defendant as approved and qualified by the Court.

Emmett Colin Jr.

Attorney for Defendant

[File Endorsement Omitted in Printing]

[fol. 11]

IN THE CRIMINAL DISTRICT COURT NO. 4
DALLAS COUNTY, TEXAS

January Term, 1965

* * * *

THE STATE OF TEXAS

vs.

JACKIE WASHINGTON

EXCERPTS FROM HEARING ON MOTION FOR NEW TRIAL

[fol. 12]

* * * *

APPEARANCES:

FOR THE STATE:

HON. HENRY WADE, Criminal District Attorney of Dallas County, Texas, by:

HON. JIM MILLER AND HON. JIM ZIMMERMANN

FOR THE DEFENDANT:

HON. CHARLES W. TESSMER AND HON. EMMETT COLVIN, JR., 706 Main Street, Suite 400, Dallas, Texas, 75202.

BE IT REMEMBERED, that upon a hearing on the amended motion for a new trial of the above entitled and numbered cause held on the 27th day of May, A. D., 1965, before HIS HONOR, JUDGE JOHN MEAD, the following proceedings were had:

[fol. 13]

* * * *

COLLOQUY BETWEEN COURT AND COUNSEL

MR. COLVIN: If the Court please, turning now to paragraph five and six of the Motion, we call now Charles Dewayne Fuller.

MR. MILLER: To which the State of Texas objects, Your Honor, as not having any materiality to the question involved in this motion for a new trial: That Charles Fuller is under indictment and under conviction for the facts arising out of this same case and that the matters which the Defense Counsel has set forth in his motion for new trial are such a defensive matter that the testimony which they wish to offer here was no more admissible than it was in the trial of Jackie Washington; that Charles Fuller is not a competent witness for the Defendant in his trial for murder on the issue; and that any testimony that Charles Fuller would give is not admissible for this Defendant upon his trial and, therefore, it is not anymore admissible in this Hearing to show whether or not the man had a fair and impartial trial and that it is completely a matter of defensive testimony which, if called, would have been offered before the jury and which the [fol. 14] law does not allow. And we object not only to his calling Charles Fuller and placing Charles Fuller on the stand and allowing him to testify in this Hearing.

THE COURT: Is that all?

MR. MILLER: Yes, sir.

THE COURT: Your request that he be called as a witness was with reference to paragraphs five and six?

MR. COLVIN: Paragraphs five and six, Your Honor.

THE COURT: Sustain the objection.

MR. COLVIN: If the Court please, note our exception at this time on the ground that the Statutes involved are unconstitutional for the reason that they violate the Defendant's—and have violated the Defendant's rights—to a fair and impartial trial in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States, and I would like to, at this time, Your Honor,—can we stipulate, Mr. Miller, that at the trial of this case,

that Mr. Law did call—uh—the co-Defendant, Charles Fuller?

MR. MILLER: Would you like to do that just by reference and incorporate the page numbers?

[fol. 15] MR. COLVIN: Yes.

MR. MILLER: I, of course, will stipulate that that fact did occur because it did.

MR. COLVIN: If the Court please, we would like to stipulate into this record the Statement of Facts of the testimony in this Cause, page 248—.

THE COURT: Is that because it's a little hazy there?

MR. COLVIN: Well, we just want it in this record here.

THE COURT: All right.

MR. COLVIN: —beginning with Line 21, I beg your pardon—beginning at Line 18 through Line 25; and again, on page 249, Lines 1 through Line 14. It is stipulated and agreed by and between Counsel for the State and Counsel for the Defendant that the record therein quoted is incorporated in the record of this Hearing by reference for all pertinent purposes.

MR. MILLER: To which we so stipulate.

THE COURT: It will be admitted into evidence.

MR. COLVIN: If the Court please, in connection with [fol. 16] the perfection of my bill, I would like to make offer of proof as to what the person, Charles Fuller, whose indictment along with Jackie Washington would testify to were he permitted to testify in court today—.

MR. MILLER: Well, now, Judge—

THE COURT: Let him finish. Let him finish.

MR. MILLER: Oh, I am sorry.

MR. COLVIN: I would make this offer, Your Honor, to perfect my Bill of Exception.

THE COURT: You're offering what he would testify to if here?

MR. COLVIN: Yes, Your Honor.

THE COURT: Is that for the purposes of the record?

MR. TESSMER: At the present time, we would offer, Your Honor, to show what he would testify to were he permitted, and no statement at all about him not being a competent witness. Otherwise, I believe that it is a

denial of the Defendant's right to perfect a Bill of Exception. We're not offering the testimony at this time; we are offering what he would say if we were permitted to call him.

THE COURT: I understand the distinction.

[fol. 17] MR. TESSMER: If he were here and if he were competent and the State is wrong about him not being competent. It is unconstitutional under the Fourteenth Amendment, because this prevents the accused of having access to all available evidence.

MR. MILLER: May I say something to this?

THE COURT: I'm going to give you an opportunity, but time is not of the essence. When they sit down, then you stand up. They are both through now.

MR. MILLER: We would like to point out to the Court here, sir, that I think if the Court will take judicial knowledge, or whatever that is, that the person that they refer to there, Charles Fuller, testified in his own trial and it would seem to me that whatever he would testify or whatever they want to perfect is set forth in the testimony of Charles Fuller in his own trial where he testified fully as to the circumstances and facts, thoughts, and feelings and everything else. It doesn't seem, I don't quite understand the distinction here, why, when this man has testified in an open court and specifically has entered sworn testimony in a trial which has a perfect record and has testified to certain facts which facts, as set forth in [fol. 18] the amended motion for new trial, do not show and did not exist in the testimony of his own trial. And for the attorneys to stipulate and offer here an unsworn statement as to what this man would testify to, if it is set forth here in their amended motion for new trial, comparably to what they want to or are going to offer, the Court is familiar with what they say there, what Fuller would testify to, is not what he testified to in his own trial.

THE COURT: What are they offering?

MR. MILLER: In relation to his amended motion, what he sets forth in there, the statements he makes in that amended motion pertaining to this. It is paragraph three. No, it is not. It's paragraph six.

THE COURT: Is that what you're offering it for in perfecting your Bill in relation to paragraph six?

MR. COLVIN: In relation to paragraph five and six, Your Honor. No, I beg your pardon, Your Honor. Paragraph six. Your Honor, I would like to make my verbal offer of proofs at this time.

THE COURT: I sustain that. Sustain the objection. [fol. 19] MR. COLVIN: You sustain the objection and will not permit my verbal offer of proofs?

THE COURT: That's right. When you say, "verbal offer of proof," you mean you want me to have Fuller brought down and put on the stand to testify, is that right?

MR. COLVIN: No, Your Honor, you've already passed on that. What we're offering now, Your Honor, is a verbal offer of proof as to what Charles Fuller would testify to if he were brought down into the courtroom in order to perfect our Bill.

THE COURT: Show me what you have to offer.

MR. COLVIN: I have an affidavit here, Your Honor, and I was going to make a verbal offer of proof to get that into the record.

THE COURT: Does the State have a copy of this?

MR. MILLER: No, sir.

MR. COLVIN: I haven't offered it.

MR. MILLER: Do you have any objections if we look at it?

THE COURT: Well, you've confused the Court when you say you have a verbal offer and here you have an [fol. 20] affidavit. Are you going to offer this to perfect your Bill, is that what you're talking about?

MR. COLVIN: We are going to make a verbal offer of proof, Your Honor, on the testimony of Charles Fuller.

THE COURT: What do you mean by "verbal offer of proof?" I don't understand what you mean by "verbal offer of proof."

MR. COLVIN: We'll read into the record what he would testify to were he here.

THE COURT: From this statement I hold in my hands signed allegedly by Charles D. Fuller, is that right—is that your verbal offer of proof?

MR. TESSMER: Your Honor, he is already ruled not a competent witness; therefore, we would want the testimony to show that were he a competent witness, that what he would have to say might be material to this lawsuit. That's all.

THE COURT: I understand that, Counsel. What's the difference in calling the man in here and you making a verbal offer of proof, what's the difference? If you want to perfect your Bill, what's the difference in calling him in here and putting him on the stand and reading the [fol. 21] affidavit? What's the difference?

MR. TESSMER: Your Honor has already ruled that we're not permitted to call him.

THE COURT: No. What's the difference—my position is that to perfect your Bill, you're saying to me that the same thing you're offering in writing is what he would say in person; I don't see the distinction in the matter. If I rule he's not competent to come down here and testify in person, I see the distinction that you want to perfect your Bill, I haven't ruled yet on the verbal offer of proof, but I want to see the distinction in my mind of the difference between the verbal offer of proof and him testifying in person. If one is valid, it seems like the other would be valid. I may let you get that in the record for the purposes of appeal. I don't know. I haven't ruled on it.

MR. COLVIN: I'll ask the Reporter to mark the statement of Charles Fuller dated May the 26th, 1965, as Defendant's Exhibit Number 5 for identification.

MR. MILLER: Are you offering it now?

MR. COLVIN: We offer it.

THE COURT: For the purposes of perfecting your Bill?

[fol. 22] MR. COLVIN: That is correct.

THE COURT: You understand I've already ruled that he's not competent to come down here and testify and you're saying to me now you have a statement, something about a verbal offer of proof, and you're saying, in order to perfect your Bill, that you have a statement here from Fuller to show what he would say if he were here, if the Court is wrong in not permitting you to call him, is that correct?

MR. COLVIN: That is correct.
MR. MILLER: That's right.
THE COURT: He would testify to this if he were here?
MR. TESSMER: And if he were competent.
THE COURT: The State has no objections to this?
MR. MILLER: No, sir.
THE COURT: Admit it into evidence for that purpose of perfecting the Defendant's Bill.
MR. MILLER: Also, would the Court take judicial knowledge that Charles Fuller was convicted in his case—indicted and was convicted?
[fol. 23] THE COURT: I'll take judicial knowledge; I tried the case, I know that. The case has been tried—put this in the record, Mr. Reporter, that I presided at this trial and that he was convicted and as far as I know, he is serving his time since it has not been appealed.
MR. COLVIN: We'll be glad to stipulate, Your Honor, that Charles Fuller was convicted and received a fifty year sentence.
THE COURT: Good.

* * * *

[fol. 24]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
APPEAL FROM DALLAS COUNTY

No. 38,873

* * * *

JACKIE WASHINGTON, APPELLANT

vs.

THE STATE OF TEXAS, APPELLEE

OPINION—Jan. 5, 1966

The conviction is for murder; the punishment, fifty years.
This is a companion cause to Fuller v. State, No. 38,873, dated January 5, 1966, not yet reported.

It is undisputed that the deceased was killed when he was shot with a shotgun about 2 A.M., Saturday, August 30th.

The testimony of the state reveals that on August 29, Jean Carter, age 17, lived with her mother and grandfather; that she had known the appellant, age 18, three or four years, and had previously dated him without the knowledge of her mother who had forbidden it; that she had known the deceased about three weeks before August 29, and had seen him during the last week except Tuesday night; that she went to see the appellant on Wednesday, August 26, at his grandmother's and they went to a friend's house, and then she returned home about noon; that she had visited him numerous times before at his grandmother's; that her mother left home about 1 P.M., and her grandfather about 4:30 P.M.; that the appellant telephoned about 4:30 P.M. and wanted her to met him at the store nearby but she declined. Jean further testified that she telephoned the deceased about 6:30 P.M., and that they were together that night and returned home about midnight; that about 2 A.M. while she and her mother were doing some housework and the deceased was sitting in the house but visible from the outside, they heard some noise which caused the deceased to go out on the porch and then she heard a shot, and the deceased said he had been shot and the police were notified.

Mrs. Ruby Bynum testified that she was a next-door neighbor of Jean Carter, her mother and grandfather; that from her kitchen window about 4:30 P.M., August 29, she saw the appellant with an open knife gripped in [fol. 25] his hand go from the front porch of the Carter house to the side door, and when no one responded he returned to the front door and after getting no response he slammed the door and kicked the screen, and on returning to the side door repeated the same acts. She further testified that after a shot from a gun awoke her early Sunday, August 30, she saw a man lying on Carter's front porch and heard him cry for help.

The testimony further reflects that shortly after 11 P.M., August 29, the appellant, driving his car, began asking different persons at various places about a gun,

and still unable to locate a gun, with several boys in the car, he said as they passed Carter's house where a 1964 yellow Impala was parked in the driveway that "if he had a gun he could blow him out of that chair"; later, appellant's inquiry of another person failed to locate a gun, and then he asked Charles Fuller who let him have a shotgun but he had no shells, and next he asked W. E. Thomas who gave him some shells, and Thomas joined the group which made seven in the car. After getting the shells the appellant drove directly to a place near the Carter house where he parked. Appellant handed two of the boys a brick while the other boy got one, and he told them to hit the car in the driveway, and when "that boy" came out he would shoot him. Two boys remained in the car, and appellant with the gun, Fuller next, followed by the three with the bricks went to the Carter house. After the three threw the bricks, and while returning to the car, they heard a shot, and shortly the appellant with Fuller carrying the gun returned and they drove away. Lorinzo Mabry, one of the two boys who remained in the car during the shooting, testified that he heard the appellant tell his mother, "Yes, I shot him," referring to the deceased.

A physician, who examined the body of the deceased, testified that the projectiles from the shotgun pierced his lungs, the heart and stomach, and his death was caused by the gunshot wound.

[fol. 26] The appellant, testifying in his own behalf, and other defense witnesses stated that Fuller was drunk, and while on the way from the car to the Carter house Fuller took the gun from him (appellant), and the other three boys ran toward the Carter house and threw the bricks, hitting the car in the driveway; that after Fuller approached the house he, appellant wanted to leave but that Fuller insisted that he was going to shoot somebody, and while running toward the car he (appellant) heard the gun discharge and a woman scream, but Fuller denied shooting a woman after he got to the car. A defense witness testified, that appellant returned to the car first with Fuller close behind with the gun.

Appellant insists that the trial court erred in refusing his motion for new trial which alleged that the jurors

heard discussions in the hallway of the courthouse before they were selected as jurors that his co-defendant, Fuller, had been previously assessed fifty years; and that during their deliberation at least one juror said he heard that Fuller received fifty years.

In support of his motion the appellant called only juror Hoffman, the foreman. He testified that after he was selected but before the jury was completed he heard a juror say that Fuller got fifteen years; that during deliberation he heard a juror say that he had heard that Fuller got fifty years, and he (Hoffman) said he had heard something else, and he then said that it had no bearing on this case and never heard it mentioned again. The affidavits of two jurors were introduced by appellant; that of Gregory recited that he heard Fuller was convicted but no mention was made of the extent of the punishment assessed; and that of Blakeslee recited that after a remark that Fuller got fifty years the foreman advised that Fuller's penalty was immaterial and nothing further was said about it.

The state introduced the affidavits of five jurors which state that they never heard or that they never had any [fol. 27] knowledge of the punishment assessed Fuller; another affidavit states that the juror did not remember anything specifically that was said about Fuller's sentence, and two others state that they thought and another stated that Fuller got fifty years but when they were told it had no bearing it was not mentioned again. The state's affidavits of jurors Blakeslee and Gregory were introduced but appellant had already introduced those given to him.

There was testimony during the trial from several witnesses that Fuller had been previously tried. A statement was made before the jury by one of the attorneys that Fuller was "under conviction" for the same offense; and the law which permits the state to call Fuller, who is "under conviction," as a witness but that appellant could not, was discussed in the jury argument.

It is concluded that the trial court did not abuse its discretion in overruling the motion for new trial.

It is contended that the trial court erred in refusing his requested charge on the corroboration of accomplice testimony for the state and as to inculpatory statements of accomplices testifying for the appellant.

No exception was reserved to the court's action, therefore the refusal of the requested charge is not properly presented for review. Massiate v. State, 365 S.W.2d 802; Thomas v. State, 387 S.W.2d 665; Faulkner v. State, 390 S.W.2d 754.

The appellant contends that he was denied his constitutional right to have compulsory process for obtaining witnesses in his favor, namely, his co-defendant, Fuller, who had been previously convicted under a separate indictment for the same transaction.

The record shows that the appellant and Fuller were co-indictees for the same offense, and the court refused appellant's request to call Fuller as a witness following the state's objection thereto.

The legislature has the power, except as limited by the constitution, to prescribe the competency of witnesses in all cases.

[fol. 28] The Arts. 711 C.C.P. and 82, P.C., have welded to them the severance statutes (Arts. 650, 651, 652, 653 and 654 C.C.P.) which provide the means and procedure for obtaining the testimony of accomplice witnesses. These statutes are procedural only, and do not deprive the accused of any constitutional right. No cases declaring Arts. 711 and 82, supra, unconstitutional are cited and we are aware of none.

The evidence is sufficient to support the conviction and no error appearing, the judgment is affirmed.

BELCHER
Judge

[SEAL]

(Delivered January 5, 1966)

Opinion approved by the Court

• • • •

[fol. 29]

IN THE COURT OF CRIMINAL APPEALS

* * * *

ORDER OVERRULING MOTION FOR REHEARING—
Feb. 23, 1966

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify, in Cause No. 38,873 styled:

JACKIE WASHINGTON, APPELLANT

v.

TEXAS, APPELLEE

that Appellant's Motion for Rehearing was Overruled Without Written Opinion on February 23, 1966.

WITNESS my hand and Seal of said Court this 26th day of October A. D. 1966.

[SEAL]

/s/ Glenn Haynes
GLENN HAYNES
Clerk
Court of Criminal Appeals of Texas

[fol. 30]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

* * * *

OPINION ON APPELLANT'S SECOND MOTION FOR REHEARING—March 30, 1966

Appellant challenges the accuracy of our original opinion wherein we said: "The affidavits of two jurors were

introduced by appellant; that of Gregory recited that he heard Fuller was convicted but no mention was made of the extent of the punishment assessed;—"

The affidavit referred to in the opinion was introduced in evidence as Defendant's Exhibit No. 2 and reads: "I was a member of the jury in Cause No. E-7925-K, styled The State of Texas v. Jackie Washington, in Criminal District Court No. 4 of Dallas County, Texas. Some time during the period which I was confined as a juror I recall a remark concerning the co-defendant's case, to the effect that he had been convicted. I recall no mention as to the number of years he was sentenced. This remark in no way effected my judgment as a juror."

Appellant directs our attention to the affidavit of the same juror (Gregory) which the state introduced as its Exhibit 13. It reads: "I was a member of the jury in the Jackie Washington murder case. I did not hear what punishment was assessed any other person who was connected with Washington in this case. I did not know what punishment was assessed any other such person and I arrived at my verdict without knowledge or consideration of what punishment any other person connected with the case may have received."

We remain convinced that under the record the trial judge did not abuse his discretion in overruling appellant's motion for new trial.

Appellant's second motion for rehearing is overruled.

[SEAL]

WOODLEY
Judge

(Delivered March 30, 1966.)

A TRUE COPY

Attest:

/s/ Glenn Haynes
GLENN HAYNES
Clerk,
Court of Criminal Appeals of Texas

[fol. 31]

SUPREME COURT OF THE UNITED STATES

No. 168 Misc., October Term, 1966

JACKIE WASHINGTON, PETITIONER

v.

TEXAS

On petition for writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition which reads as follows:

"1. Is Petitioner's conviction and sentence void because he was denied his rights under the Sixth and Fourteenth Amendments to to the Constitution of the United States to have compulsory process in obtaining an available witness in his favor, namely a Co-Defendant, charged and previously convicted under a separate indictment for the same transaction and which Co-Defendant, according to his Affidavit, could have exonerated Petitioner if such testimony were believed by the jury?"

The case is transferred to the appellate docket as No. 649 and placed on the summary calender.

October 10, 1966

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